SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1975

No. 75-930

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *et al.*, *Petitioners*

v.

EAZOR EXPRESS, INC., *et al.*, *Respondents*

RESPONDENTS' MEMORANDUM IN REBUTTAL

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RESPONDENTS' MEMORANDUM IN REBUTTAL

Petitioners state in their Reply Memorandum (page 6) that the materials submitted to the courts below do not show "* * * why ten other adjustments urged by defendants' accountants * * * were not made."

This is not so.

Each one of these proposed adjustments was discussed in detail in the International's Brief on the issues of damages in the District Court (Supplemental Appendix 266b-293b) and in plaintiffs' Reply Brief there (Supplemental Appendix 334b, 393b-405b).

Petitioners also state (Reply Memorandum, page 7): "There is no indication in the Court of Appeals' opinion that it did review these materials; indeed, those materials were not called to the Court of Appeals' attention by either party, for the obvious reason that they did not deal with any of the issues which were in dispute on the appeal."

These statements, too, are wrong.

The very same arguments advanced here were made at pages 37-38 of the International's primary Brief in the Court of Appeals, to which we responded, at page 52 of our Reply Brief, by referring the Court of Appeals to the Briefs in the court below printed in the Supplemental Appendix. Photocopies of the noted pages from the Briefs in the Court of Appeals are appended to this Memorandum.

The District Court necessarily analyzed all of these arguments in reaching its decision as to plaintiffs' losses during the Strike (App. 26a). Also, the Court of Appeals expressly considered, and expressly rejected the defendants' arguments in this regard, stating (65a):

> "The district court threaded its way through this maze and found as a fact that the total aggregate loss suffered by the two plaintiffs during the period of the strikes was $1,079,332.00. * * * All the defendants urge that the loss established by the evidence was only $696,255.00 at the maximum and possibly as little as $208,375.00. Our consideration of the record satisfies us, however, that there was support in the evidence for the finding of the district court that the plaintiffs' total loss was $1,079,332.00 and we cannot say that this finding was erroneous. We, accordingly, adopt that figure as the district court did, as a starting point for the discussion of the damages."

CONCLUSION

Clearly, contrary to the petitioners' arguments, both the District Court and the Court of Appeals properly analyzed each of the many and detailed contentions of the parties with respect to plaintiffs' direct losses during the Strike, and petitioners' arguments to the contrary are fiction. Neither the function nor the calendar of this Court suggests that this matter be passed on once more here.

The Petition for Certiorari should be denied.

TOM P. MONTEVERDE
Attorney for Respondents, Eazor Express, Inc., and Daniels Motor Freight, Inc.

* * *

. . . nate the strike."[36] If causation cannot be determined even with hindsight, it is not fair to charge the union with failing to foresee what actions would benefit the employer. Otherwise the promise to use every reasonable means to terminate the strike becomes a guarantee that the employer will not have any losses due to an unauthorized work stoppage. Even plaintiff does not argue that this is what it bargained for with any of these defendants.

IV. THE CALCULATION OF DAMAGES

A. The District Court's Conclusion As to the Total Loss During the Strike Was Unsupported by Necessary Findings, and in Any Event Was Clearly Erroneous and Should Be Corrected by This Court If Liability Is Upheld

As we have pointed out in our counterstatement of the case (*supra*, pp. 8-9), Eazor itself concluded that its actual loss for the strike period was $696,255 and not the $1,079,-332 which the District Judge used as his "starting point" to compute damages. In addition, in adopting this "starting point" the District Judge failed to make any findings which show how he arrived at the figure of 1,079,332.[37] Moreover, the court also failed to make any finding whatever

36. "Reasonable means" also includes only those means which are normal and appropriate for a union in the triparte relationship of a collective bargaining agreement—employer-employee-union. For example, if the cause of a wildcat strike were the strikers' view that the employer owed them such overtime wages, the union would not be obligated to make up the difference even though the members expressed willingness to return to work if the union were to do so.

37. The number apparently comes from Eazor's brief in support of proposed findings of fact and conclusions of law on the issue of damages (JA (Supplemental) 201b-203b) wherein Eazor's counsel

with respect to the evidence adduced by the defendants to show that the actual loss for the strike period was not $696,255, but rather $208,375. (See 2JA [38] 646-653, International Proposed Finding 55, for calculations).[38]

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attempted to revert to the initial figures which had been corrected and extensively revised by Eazor's own accounting staff. Eazor's counsel thus repudiated his own representation that Eazor's initial figures had "substantially overstated the losses for those months" and disregarded all of the adjustments which had been made by Eazor's accountants in attributing revenues and expenses to proper periods.

38. The question of the amount of loss incurred by Eazor during the months in which the strike occurred was the subject of considerable testimony and documentary evidence. There were conflicts between the experts, not only with respect to application of accounting principles, but also with respect to what were the actual expenses and revenues during these months. Examples of some of the items in dispute follows. The Unions' accountants testified that since terminal and equipment maintenance expense had gone up sharply during the strike period, this reflected extraordinary and/or deferred maintenance which Eazor had chosen to do during the period in which the terminals and equipment were inactivated by the strike and which did not represent a normal, ongoing expense. They therefore reduced the terminal and equipment maintenance to a revenue related formula (12JA 4058-4060, 4065-4068; 4JA (Exhibits) 1167; Exhibit C-2). Similar adjustments in the office and miscellaneous expense accounts would have reduced the August-September loss by $20,237 (12JA 4061-4062; 4JA (Exhibits) 1167a, Exhibit C-2), and a reduction in the equipment depreciation account to reflect the extent to which that equipment was actually used, would have further decreased the August-September loss by $92,300 (12JA 4068-4071; 4JA (Exhibits) 1167a; Exhibit C-2). Evidence was also received of substantial retroactive payments by Mack Truck for repairs made to guaranteed equipment in the period of June 1968 to June 1969. In the absence of records upon which a portion of those payments could be precisely allocated to the months of August and September 1968, an allocation of 1/12th of the total Mack payments to each of these months seemed reasonable and appropriate to the accountants for both sides (13JA 4313-4318, 4330, 4338-4344, 4353-4377, 4391-4400, 4404-4409; Exhibits P176, P177, P178). This one item would have further reduced August-September losses by $46,800, but it also appears to have been neither accepted nor rejected, but simply ignored. There were other disputed adjustments as well.

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. . . ence between the direct Strike losses when calculated by the alternative methods.

As the court below noted (J.A. 675a-676a), the existence of losses of at least this size over the same period could also be established by Eazor's reports to the Interstate Commence Commission. The losses can also be confirmed by comparing Eazor's audited year end figures for 1968 with its unaudited figures as of the end of July of that year (cf. J.A. 585a and 805a), and by calculating losses of profits on the basis of a percentage of revenues lost (J.A. 4641-4646, Ex. P-685-858a), which was the method followed and approved in *L. W. Mead, Inc. v. Brotherhood etc.*, 129 F.Supp. 313 (1955), 230 F.2d 576 (1 Cir. 1956), and *Roadway Express, Inc. v. Highway Truck D. & H. Local No. 107*, 299 F.Supp. 1058 (E.D. Pa. 1969).

Eazor's accountant, and therefore the trial court, accepted, for purposes of argument, most of the adjustments suggested by union accountants, but not all of them were accepted, and the International takes exception to this in a footnote at page 38 of its brief. The reasons, as substantiated in the evidence, for Michael Bache's and the trial court's rejection of the Teamster contentions referred to in the footnote can be established by a review of our Reply Brief as to damages in the court below, as this Court may readily verify by reviewing the Index (J.A. 334b) and the relevant portions of the brief itself. (The arguments responsive to the matters referred to in the Teamster's footnote are discussed in sequence at J.A. 394b-398b).

B. The Teamster Arguments on Mitigation of Damages Considered.

All Union arguments under this heading assume the factual accuracy of the trial court's factual findings with respect to Eazor's alleged intransigence with respect to

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discharges, namely, that Eazor refused to reinstate anyone unless and until all who had been discharged returned to work. Actually, as we pointed out in our primary brief here (p. 34), the record shows no intransigence on the part of . . .

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